

FILED

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHILIP YU, by his parents PAUL YU
and TERESA YU and PAUL YU and
TERESA YU individually,

Plaintiffs,

vs.

HILLSBOROUGH CITY ELEMENTARY
SCHOOL DISTRICT and SAN MATEO
COUNTY DIVISION OF MENTAL HEALTH,

Defendants.

C-87-4737 MHP

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before this court for review of a final decision of a hearing officer (hereinafter "Administrative Law Judge" or "ALJ") of the Office of Administrative Hearings of the State of California pursuant to the Education of the Handicapped Act ("EHA" or "Act"), 20 U.S.C. section 1401 *et seq.* and, in particular, section 1415 of the Act. The court has considered the administrative record and the additional evidence presented at trial, which was conducted a number of years ago. At the close of trial the court indicated its intended decision, but apparently no findings and conclusions were ever issued. These finding and conclusions shall be deemed the final decision of the court and the record of the court's bench order is incorporated herein. To the extent that findings of fact are included in the conclusions of law they shall be deemed findings of fact and to the extent conclusions of law are included in the findings of fact they shall be deemed conclusions of law

FINDINGS OF FACT

At the time of trial plaintiff Philip Yu was eight years and nine months old. He suffers from a pervasive developmental disorder which has been diagnosed as a form of autism. He has been identified as severely handicapped and it is not disputed that he is entitled to the special education and related services provided for by the EHA. As a result Philip is entitled to an Individual Education Plan ("IEP") under the Act. There is no dispute that IEPs were developed for Philip and that his parents were fully informed and cognizant of their rights under the Act including their right to challenge the IEPs and the defendant District's placement pursuant to them at various stages including through a due process hearing. The parents exercised those rights with respect to a 1986 IEP, culminating in a hearing before an ALJ in accordance with the EHA and the pertinent federal and state regulations.

The ALJ conducted the hearing and took testimony over a four-day period with plaintiffs presenting twelve witnesses and defendants presenting six witnesses. The ALJ made detailed and thorough findings in a seven-page, single-spaced decision. The court has reviewed that decision and the transcripts of the testimony. In addition, this court heard the testimony of nine witnesses and received a number of documents into evidence.

The evidence shows that Philip first entered the Hillsborough Elementary School District ("District") in January 1984. Prior to that he had been in programs operated by the County of San Mateo. Pursuant to an IEP conducted on January 10, 1984, he was placed in the Los Prados Severely Emotionally Disturbed Program and remained in that program through the end of the 1984-85 academic term. Pursuant to an IEP meeting held on May 30, 1984, the placement was extended through the 1984-85 term. Philip's parents unilaterally removed Philip from Los Prados in September 1985 and placed him in a private school, Peninsula Children's Center ("PCC") in Palo Alto California. This was done without consultation with, or with the approval of, the District. Nor did the parents avail themselves of the right to a due process hearing. Philip's parents removed him from Los Prados because they were dissatisfied with his performance in that program and believed that PCC would better serve his needs.

1 The January 1984 IEP included a lengthy assessment of Philip's academic, communication,
2 social adaptation, psychomotor and self-help levels. *See* Ex. 73. It set specific goals and timetables
3 to address each of these areas along with measurements to determine achievement of the goals and
4 whether they should be continued or revised. The IEP team recommended a placement in a "highly
5 structured self-contained special class which can meet his communication, behavioral [sic], self-help
6 and academic needs" with "[s]peech and language...provided for three twenty minute periods a
7 week." The team recommended the Los Prados program as an appropriate program to meet the needs
8 set forth in the IEP. The IEP placement summary reflects that a parent attended the meeting and had
9 been informed of their due process rights. The form so indicating was signed by one of the parents.

10 In May of 1986 the parents requested an IEP meeting to discuss funding of Philip's
11 placement at PCC. This resulted in an assessment of Philip and the development of an IEP. Finally,
12 in December of 1986 an IEP was drafted and signed by the participants at the meeting which
13 consisted of the PCC staff, the District and Los Prados staffs, and the parents, with Philip's mother
14 signing off on the IEP. The parents were assisted in the IEP process by a professional educational
15 consultant. The IEP provided for placement in an integrated highly structured comprehensive
16 program with a one-to-one ratio time to be determined, the provision of speech and language therapy
17 in three twenty-minute individual sessions and one twenty-minute session with parents weekly, the
18 provision of adaptive physical education for forty minutes weekly, and the provision of individual
19 psychotherapy for sixty minutes weekly, broken into segments, along with collaborative parent
20 therapy at least weekly. *See* Ex. A-8. The IEP included the incorporation of goals and objectives
21 already formulated by PCC. The District determined that Philip's needs could be met at Los Prados
22 and the services required by the IEP could be provided by Los Prados. A follow-up meeting of the
23 IEP team was conducted in January of 1987 with the IEP team recommending placement at Los
24 Prados employing the program developed at the December meeting and a detailed transition plan for
25 Philip's return to Los Prados from PCC. The district agreed to fund Philip's educational program at
26 Los Prados and the costs of PCC during the transition period. The final January 1987 IEP was
27 signed by the District participants, Philip's mother and their professional consultant.

1 Thereafter, and after observing the Los Prados Program, the parents notified the District on
2 February 20, 1987 that they did not believe the Los Prados Program was appropriate for Philip and
3 cancelled the transition plan. The District declined the PCC placement for the transition period and
4 plaintiff's brought this action for retroactive reimbursement, prospective placement at PCC and
5 transportation to that program.

6 The threshold question is whether the District can provide an "appropriate public education"
7 designed to meet the unique needs of Philip along with the services that are necessary to assist him to
8 benefit from the instruction and consistent with his IEP. This requires instruction tailored to the
9 specific child's needs with sufficient supportive services to accomplish the purpose of the
10 instruction. Generally, the agreed to IEP will express the targeted goals and the means to achieve
11 them. Any disagreement the parents have with the IEP may be raised in a due process hearing.

12 In the first instance, in 1985, the parents unilaterally removed Philip without seeking a due
13 process hearing. In the second instance, in 1986, they agreed to the IEP which was signed by
14 Philip's mother in January 1987. Then, in February 1987 they notified the District they believed the
15 Los Prados program was not appropriate for Philip and were cancelling the transition plan provided
16 for by the agreement. When the District declined to fund the PCC placement they instituted this
17 action.

18 First of all, the court has reviewed the findings and conclusions of the ALJ contained in his
19 decision. Having also reviewed the hearing transcripts of the testimony and other evidence before
20 him, the court finds that his decision comports with the testimony of the witnesses. Therefore, it is
21 appropriate to look to his summary. The thrust of the issues before the ALJ is substantially similar to
22 those raised before this court. Plaintiffs' primary focus is on the importance of one-to-one
23 instruction and services. They compare the Los Prados program to the one Philip was receiving at
24 PCC where the extent of one-to-one teaching and therapy was greater. They also compare the
25 student-teacher ratio at the two programs and argue that in the latter program the ratio is smaller,
26 thus allowing more time for teachers or program aides to work with the student. There does not
27 appear to be that much disparity in the curriculum of the two programs; it is more a question of the
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1 style or approach used.. For students at Philip's level of functioning it appears that the curriculum is
2 substantially the same. The focus is on learning techniques, behavioral and language development,
3 social and self-help skills and psychomotor and other functions. Any substantive differences in the
4 curriculum are minimal.

5 The ALJ found that Philip "does not require one-to-one for his full day" as argued by
6 plaintiffs" and that even at PCC Philip was receiving approximately 50% of his day in one-to-one
7 "academic and behavioral intervention". See Ex. A, Decision of ALJ, at p.3. After discussing the
8 programs and instruction available at the two schools, Los Prados and PCC, the ALJ concluded that
9 the personalized program required for Philip could be implemented at Los Prados.

10 The parents' educational consultant testified before the ALJ, but not before this court. In the
11 administrative proceedings he testified that Philip requires a "small structured classroom setting with
12 a teacher to pupil ratio of one teacher to not more than five pupils" and "one-to-one prompting", but
13 not "one-to-one on a full day basis." *Id.* at p.2. The ALJ found that Los Prados could meet the
14 requirements plaintiffs sought. However, plaintiffs seem to have moved the goal posts on these
15 proffered requirements since the time of the administrative hearing, for they now argue for a full day
16 of one-to-one and an even lower teacher-student ratio.

17 The court has carefully considered the testimony of all the witnesses in this case including, of
18 course, those called by plaintiffs. It is important to point out that there is no dispute as to the
19 qualifications of the witnesses called by the parties as experts. One of them, an expert educational
20 consultant, Dr. Marly Perkins, testified in the administrative hearing as to Philip's learning level and
21 limitations. She agreed that the program at Los Prados could be individualized to provide adequate
22 one-to-one for Philip by "rearranging staffing", removing the "two to three high functioning pupils"
23 from the classroom setting, and "restructuring of the curriculum". She also testified in this court and
24 asserted that Philip required one-to-one instruction for most if not all of the day. She conceded that
25 if his IEP was changed to include the one-to-one instruction she proposed, Los Prados could provide
26 that instruction because of its flexibility. Finally, she acknowledged that the test she is using in
27 determining what is an appropriate education is that autistic children "need the best".

1 Dr. Diane Kirchner, who did not testify in the administrative proceeding, testified before this
2 court. She is a speech/language therapist. Dr. Kirchner testified that Philip needs one-to-one all the
3 time in order to be productively engaged, maintain attention and participation. She also testified
4 that the Los Prados group to which Philip was and would be assigned was more independent and
5 higher functioning than Philip and, thus, was not an appropriate placement. Her understanding of the
6 curriculum and approach of Los Prados is at odds with the testimony of several of the professionals
7 and workers from Los Prados who testified at trial.

8 Pam Vorce, who works one-to-one with Philip at PCC, testified as to her observations of
9 Philip and his participation in the PCC program in both the administrative and court hearings. She is
10 an accredited speech and language practitioner. She described his attention, language and social-
11 interactive deficits, and self-stimulating behaviors. She acknowledges that she has not observed and
12 is not familiar with the program at Los Prados. She also acknowledges that she has a very strong
13 bias toward one-to-one teaching.

14 The court heard several witnesses who are professionals or work at Los Prados, most of
15 whom have worked with Philip. Some of them testified in the administrative hearing. Their
16 descriptions of Philip's needs, learning ability and behavior are consistent with the other testimony
17 and record in this case. They are also consistent in their belief that Philip's exceptional needs which
18 qualify him for special education and are as set forth in his IEP can be met by the Los Prados
19 program and that the program is and can be individualized in such a manner as to provide him with
20 an appropriate public education.

21 Philip's mother testified at the court hearing. She, of course, disagrees with this opinion.
22 Certainly, as any parent, she wants the best for her child and believes that the program at PCC best
23 meets her expectations. However, as explained below, even considering the California educational
24 standards in addition to the requirements of the EHA, the law does not require the "best". The
25 requirements of the law are set forth below.

26 CONCLUSIONS OF LAW

27 This court has jurisdiction over this action pursuant to the Education of the Handicapped Act
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1 (“EHA”), 20 U.S.C. sections 1415(e)(2) and (e)(4), and section 504 of the Rehabilitation Act of
2 1973. Although those are the statutes invoked in the complaint filed in this action, the parties
3 proceeded to trial only under the EHA. In fact, the analysis and result would be no different under
4 section 504 since the current statute, 20 U.S.C. § 1415(l), codifies the earlier developing case law.
5 That subsection provides that “[n]othing in this chapter shall be construed to restrict or limit the
6 rights, procedures, and remedies available” under a number of other enumerated statutes including
7 29 U.S.C. § 791 *et seq.*, “except that before the filing of a civil action under such laws seeking relief
8 that is also available under this subchapter, the procedures” under the IDEA, the successor to the
9 EHA, have been exhausted “to the same extent as would be required had the action been brought
10 under this subchapter [the IDEA].”¹ The rationale for this requirement was the same before the
11 enactment of the current version of section 1415(l), namely, that the EHA and its successor statutes
12 provide a detailed procedural regimen that should not be supplanted by a less rigorous one.

13 The EHA requires that every handicapped child be provided a “free appropriate public
14 education” (“FAPE”) tailored to the needs of the handicapped child by the development of an
15 “individualized educational program” or IEP. *See* 20 U.S.C. §§ 1412 and 1401. A “free appropriate
16 education” consists of a program designed to meet the unique needs of the handicapped child,
17 supported by such services as are necessary to permit the child to benefit from the program. *Board*
18 *of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982).
19 There is no one-size-fits-all program of instruction. The program must meet the needs of the
20 individual child. On the other hand, “[a]n ‘appropriate’ public education does not mean the
21 absolutely best or ‘potential-maximizing’ education for the individual child.” *Gregory K. v.*
22 *Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir.1987). It must be a program that is “reasonably
23 calculated to provide... [the particular student] with educational benefits.” *Id.*

24 The EHA lays out a detailed procedure for the assessment of the student and the development
25 of the IEP with parental involvement and due process guarantees, including an administrative
26 hearing before a designated state agency. The findings of the hearing officer are a part of the record
27 that the district court receives if an appeal is taken from the officer’s determination. On review the
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1 district court shall consider the record of the administrative proceedings, additional evidence
2 presented by the parties, and render a decision based on a preponderance of the evidence, granting
3 such relief as the court determines is appropriate. *See* 20 U.S.C. § 1415. “Due weight” is to be
4 given to the administrative proceedings. *Rowley*, 458 U.S. at 206. Greater or “substantial weight”
5 should be given to the hearing officer’s decision when it “evinces his careful, impartial consideration
6 of all the evidence and demonstrates his sensitivity to the complexity of the issues presented. *County*
7 *of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir.1996) (quoting
8 *Ojai Unified Sch. Dist. v. Hackson*, 4 F.3d 1467, 1476 (9th Cir.1993)).

9 However, the review by the district court is not *de novo*. The court must make its own
10 independent judgment based upon the testimony it hears and the “due weight” it gives to the hearing
11 officer’s findings and conclusions. The court is not to substitute its own judgment for that of “sound
12 educational policy” of the school. *Rowley*, 458 U.S. at 206. Thus, the court looks to the soundness
13 of the school’s decisions and the soundness of the hearing officer’s determination, and, taken
14 together with the testimony heard at trial, makes its own decision within the confines of and
15 consistent with the statute.

16 Parents who believe that their public school is not providing a FAPE may unilaterally remove
17 their disabled child from the school, place him in another educational institution including a private
18 one, and seek reimbursement for the alternate placement. *School Committee of Burlington v. Dep’t*
19 *of Education.*, 471 U.S. 359, 374 (1985). That is what occurred in the case at bar. However, parents
20 may only obtain reimbursement if the court determines that the public school placement did not
21 comply with the EHA and the alternate placement was appropriate under the statute. *See Florence*
22 *County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (2009). Thus, the threshold question here is
23 whether the program provided by the defendants satisfied the requirements of the EHA. If it does,
24 then the parents are not entitled to reimbursement; if it does not, then the court needs to reach the
25 reimbursement issue.

26 Based upon the court’s findings above, the court concludes the preponderance of the evidence
27 establishes that the unchallenged IEP of 1984 and the program instituted pursuant to it provided the
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1 required FAPE. In connection with the 1986 IEP and the unilateral removal of Philip from Los
2 Prados in 1987, the court concludes based upon the above findings, that the preponderance of the
3 evidence established that the District complied with the FAPE requirements and was prepared to
4 proceed with the placement it offered. And, further the court concludes that the FAPE and
5 placement offered satisfied the District's obligations under the EHA.

6 These conclusions are not changed by the argument that California law requires a greater
7 burden. Reviewing the California Education Code provisions and the pertinent California
8 Regulations, relied upon by plaintiffs, shows that they do not place any greater responsibility on the
9 District than that required by the EHA. The only possible provision that might suggest otherwise is
10 at 5 Cal. Admin. Code section 3001(b) which states that an educational program under the FAPE
11 requirement "shall provide the equal opportunity for each individual with exceptional needs to
12 achieve his or her full potential, commensurate with the opportunity provided to other pupils." The
13 court does not read this as a "potential-maximizing" requirement, unlike the statutes of some other
14 states cited by plaintiffs. California's regulation limits the "full potential" language to opportunities
15 "commensurate" with those of other students. There is no evidence in the record as to what the
16 opportunities for other students are or how they would be measured. Indeed, the whole purpose of
17 the EHA itself is to achieve that within the framework of the Act. Therefore, the court concludes
18 that California law does not provide a higher standard than the EHA.

19 CONCLUSION

20 Based upon the foregoing findings and conclusions, the court finds that plaintiffs have failed
21 to establish by a preponderance of the evidence that they are entitled to the relief sought with respect
22 to placement and reimbursement and judgment will be entered accordingly.

23 IT IS SO ORDERED.

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25 Dated: Sept. 28, 2012

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MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. The Individuals with Disabilities Education Act ("IDEA") was enacted in 2004 and amended the EHA, which also had been amended several times after its adoption. Both acts were codified at 20 U.S.C. section 1401 et seq.